PENNYWIT *v.* EATON.

[ON MOTION.]

The court refused to dismiss, for want of jurisdiction, a case brought here as within the 25th section of the Judiciary Act, when they could see a Federal question raised under it, though raised somewhat obscurely; and though they had "a very clear conviction" that the decision of the State court was correct, so clear indeed that as it finally turned out (see *infra*, next case) they affirmed it with 10 per cent. damages, because any writ of error could have been prosecuted only for delay.

ON motion to dismiss, for want of jurisdiction, a writ of error to the Supreme Court of Arkansas.

Eaton sued Pennywit in the Pulaski County Court of Arkansas upon the record of a judgment rendered by the Fourth District Court of New Orleans, that court, when the judgment was rendered, *having been held by a judge appointed by a military governor of Louisiana.* On the trial in the Pulaski County Court, the court was requested by the defendant to hold, that if it appeared from the evidence that the judge who presided in the court at New Orleans and rendered the judgment, held his office by appointment of a military governor of the State of Louisiana, and under no other authority, the judgment was void. But the Pulaski County Court did not so hold, but held to the contrary; and the Supreme Court of Arkansas affirmed its judgment. The case was now brought here under an assumption that it came within the third clause of the 25th section of the Judiciary Act (quoted *supra*, p. 3), which gives a right to bring here for review any suit "where is drawn in question the validity of any clause of the Constitution . . . or commission held under the United States, and the decision is against the title, right, privilege, or exemption specially set up or claimed *by either party* under such clause." The title, right, privilege, or exemption here meant to be set up was one by

the defendant, and was supposed to arise under two clauses* of the Constitution, which ordain as follows:

"The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the *Congress* shall from time to time ordain.

"The *President of the United States* . . . shall nominate, and by and with the advice and consent of the Senate shall appoint judges of the Supreme Court, and *all other officers of the United States*, whose appointments are not herein otherwise provided for, which shall be established by law."

Mr. W. M. Rose, in support of the motion; Mr. A. H. Garland, contra.

The CHIEF JUSTICE:

The Pulaski County Court was requested to hold, that if it appeared from the evidence that the judge who presided in the court at New Orleans and rendered the judgment there, held his office by appointment from a military governor of the State of Louisiana, and under no other authority, the judgment was void. This raised, though somewhat obscurely, the question whether the court so held had any jurisdiction under the Constitution of the United States, and the question was decided against the privilege claimed under the Constitution by the defendants.

We cannot, therefore, dismiss the case for want of jurisdiction, although we may have a very clear conviction that the decision of the State court was correct.

MOTION DENIED.

[See the next case.]

* Article 3, § 1, and Article 2, § 2.

PENNYWIT *v.* EATON.

[ON MERITS.]

Judgment affirmed with 10 per cent. damages in a case brought here in disregard of the law as already settled by precedents of the court.

ERROR to the Supreme Court of Arkansas; the case being this:

On the 3d day of January, 1862, during the late rebellion, the Fourth District Court of New Orleans (then held by a judge appointed by a *military* governor of Louisiana) issued a writ of attachment against the steamer "Thirty-fifth Parallel," of which one Pennywit and certain other persons were owners; each owning a part. These owners had given a promissory note at New Orleans, on the 8th day of October, 1861, for $6795.71, to Eaton & Betterton. Bond with sureties was given, and the attachment was released. Judgment was subsequently rendered against the defendants personally for the amount of the note with interest. Suit was instituted upon this judgment against Pennywit, in a court of Pulaski County, in Arkansas. The defence was that at the time of the original suit, Pennywit was not a citizen of Louisiana, and had not been served with process, but that he was a citizen of Arkansas, then domiciled there, and had ever since remained such. The judgment of the Pulaski County Court was for the defendant, and on appeal taken by the plaintiffs, the judgment was reversed in the Supreme Court of the State. In the meantime Pennywit died, and the suit was revived against his executors, and judgment was rendered against them in pursuance of the mandate of the Supreme Court. This latter judgment was affirmed in the Supreme Court, and the case was brought by writ of error to this court.

Mr. A. H. Garland, for the plaintiffs in error:

1. The case originated upon what purported to be a judgment, rendered in a New Orleans court, by *attaching* a steamboat. The suit in that court was not an attachment against

the interest or property of Pennywit in the steamboat, but was a proceeding *in rem* and directly against the boat itself. No such proceeding could be valid except when the process issued from an admiralty court of the United States.* The court could not by its process thus seize upon the boat.

2. The judge who presided in the court that pretended to render judgment was appointed by the military authority then holding the territory of Louisiana, and his commission was issued by that authority. Neither the military commander nor the military governor of Louisiana had any such power, and the appointment in this case was a nullity. If, as this court has decided, in *Texas* v. *White*,† the seceding States were still States of the Union, then it is as true, no military appointments of judges for Louisiana, one of those seceding States, can be upheld. If it be held, however, that Louisiana, being then in war against the General Government, and the forces of the latter having had possession of her territory, a government there by those forces was a necessity, that may be admitted, so far as the necessities of military occupation were concerned, and no further.‡ When this court said, in *The Grapeshot*,§ that a court organized by the President of the United States in Louisiana, during the occupation by the Federal troops, was a lawful court, it did not state or intimate that any military commander or governor there could organize a court and appoint judges. How does the President himself get the authority? Obviously as commander-in-chief of the army, under the Constitution of the United States. When it is given to him as such, it is given to no one else. It is not shown that Mr. Lincoln, the then President, attempted to delegate his authority to his subordinates in Louisiana; and if he had it would not help the matter. A delegated authority cannot be delegated.

Mr. W. M. Rose, contra.

* The Moses Taylor, 4 Wallace, 411; The Hine *v.* Trevor, Ib. 555; The Belfast, 7 Id. 624.

† 7 Wallace, 700. ‡ Handlin *v.* Wickliffe, 12 Id. 173. § 9 Id. 129.

The CHIEF JUSTICE delivered the opinion of the court.

Two questions are presented, both of which have been adjudicated. The first relates to the proceeding of the court of Louisiana, by which the original judgment was rendered. It is claimed that this was a proceeding in admiralty. It was, in fact, a proceeding against the persons of the defendants, instituted by attachment. Such a suit, we have held, is not a proceeding in admiralty.*

The second question relates to the validity of the appointment of the judge who presided in the court of the Fourth District of New Orleans. His commission came from the military governor, who was appointed by the President during the late war. We have already decided that such appointments were within the power of such a governor.†

There can have been no good ground for the writ of error under the former adjudications of this court, and there is no attempt to question these adjudications. We are obliged, therefore, to regard this writ of error as prosecuted for delay.

The judgment of the Supreme Court of Arkansas must be

AFFIRMED, WITH TEN PER CENT. DAMAGES.

EX PARTE ROBERTS.

The allowance of an appeal to this court by the Court of Claims, does not absolutely and of itself remove the cause from the jurisdiction of the latter court, so that no order revoking such allowance can be made.

ON petition of M. O. Roberts for a writ of mandamus to the Court of Claims to require that court to hear, entertain,

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* The Genesee Chief *v.* Fitzhugh, 12 Howard, 443; Jackson *v.* Steamboat Magnolia, 20 Id. 296; Taylor *v.* Carryl, Ib. 583; The Hine *v.* Trevor, 4 Wallace, 555; The Belfast, 7 Id. 624; Leon *v.* Galceran, 11 Id. 185.

† Handlin *v.* Wickliffe, 12 Id. 173; Leitensdorfer *v.* Webb, 20 Howard, 177; The Grapeshot, 9 Wallace, 133.